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is, in its own right, a deep analysis which can profitably be set into the larger context described by Schrage and Ibbetson. One can only agree with and congratulate the editors, who insist that this book aims “to continue the tradition of learned scholarship which, working from a historical point of view, aimed to identify the features linking the Common Law and the Civil Law, notwithstanding the obvious distinctions between them” (1). As a result, one cannot deal any more with third party beneficiaries without analysing the results offered to the legal community by this working group. Indeed, we will all be third party beneficiaries of this tremendous academic work, even when working with the law in modern practice.

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Eric Descheemaeker, THE DIVISION OF WRONGS: A HISTORICAL COMPARATIVE STUDY

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English language legal scholarship has been blessed over the past two decades or so by the publication of a number of works which have added greatly to the understanding of the development of European private law and which stand out as superb examples of such scholarship: Reinhard Zimmermann's *The Law of Obligations* (1996), James Gordley's *Philosophical Origins of Modern Contract Doctrine* (1991) and *Foundations of Private Law* (2007), and David Ibbetson's *A Historical Introduction to the Law of Obligations* (1999). Eric Descheemaeker's new book on the history of the taxonomy of wrongs is worthy of a place on the shelf alongside such works.

Within the law of obligations, delict has suffered from a relative dearth of recent structural scholarship. Contract has of course been the subject of much analysis, as well as of new model law (most recently in the draft Common Frame of Reference (DCFR)). Unjustified enrichment, as a notoriously neglected obligation, benefited from a burst of academic interest from the 1980s onwards. Delict has lagged behind, though there have been occasional scholarly forays, such as Birks's essay on the nature of civil wrongs in David Owen (ed), *The Philosophical Foundations of Tort Law* (1995). The Principles of European Tort Law appeared in 2005, and tort now of course also forms part of the provisions of the DCFR, but historical monographs in the field of the history of tort law have been neglected. The current focus of tort scholarship – contemporary comparative analysis – cannot be undertaken properly without an idea of why legal systems structure their tort laws in the way they do. Descheemaeker's book is an invaluable contribution in that respect.

Descheemaeker does not offer a comprehensive review of European delict. Instead he focuses on why the law of wrongs of three systems – Roman law, French law, and English law – is structured in the way it is. The focus of study is, for Roman law on the period from Gaius to the Justinianic consolidation, for French law from Pothier onwards, and for England largely on the period since the eighteenth century, though there is a useful review of the medieval system of actions that so marked (or as might be said, hampered) later conceptual development. Some may argue that the scope of the work is unduly restrictive, yet Descheemaeker provides a perfectly sound justification for his selection: the Gaian-Justinianic model of Roman law

remains the touchstone for European legal understanding of private law in general, including the law of wrongs, a model which was consciously carried over into French law (a system thus chosen for its continuity) yet not into English law (included therefore as a curious contrast with the Roman heritage).

Descheemaeker's central thesis is that the English law of wrongs is unitary, the Civilian (and hence French) dualist. By this he means that there is no substantive division between any of the types of wrong in English law making some more "wrongful" than others, whereas in Civilian systems, founded upon Roman law, there is a division into obligations arising *ex delicto* and those arising *quasi ex delicto*, the former category encompassing (in the Roman period at least) wrongs based upon fault, the latter those based upon strict liability.

The development of Descheemaeker's thesis proceeds in a logical and methodical manner. In an introductory chapter, Descheemaeker defines a wrong as the violation of a right, though of course the law of civil wrongs as traditionally conceived is more narrowly confined than the law of the violation of all rights. While modern legal systems, quite sensibly, treat criminal wrongs and civil wrongs differently, Descheemaeker asserts, somewhat controversially, that what are usually called criminal wrongs are not wrongs properly speaking. This, he says, is because, with crimes, no rights have been violated, not even rights held by the sovereign. Here Descheemaeker adopts the Austinian view that, while a sovereign imposes duties on subjects, thus creating reciprocal rights in subjects, such a sovereign is not itself the holder of any rights. But at this point Descheemaeker somewhat ignores the counter-argument that it is the victim of a crime who possesses the right, the violation of which the sovereign may choose vicariously to enforce on the victim's behalf through public prosecution. This counter-argument finds some support from the fact that, not only are there limited circumstances in most jurisdictions when a victim can bring his own criminal prosecution, but also in that, in some jurisdictions, some things which are criminal wrongs may also be civil wrongs, as is the case for instance with the wrong of assault in Scots law. In such a case of assault, a civil suit may be brought for the wrong quite independently of any prosecution for the crime considered to have been committed by the same act. Such overlapping liability discloses a legal history in which an older model of wrongs prosecuted in civil suits has been gradually supplanted by criminal prosecution, while also more recently giving rise to a right to compensation for a victim of certain crimes (like assault) from a public fund (the Criminal Injuries Compensation Scheme, operating throughout the United Kingdom). One cannot help thinking that Descheemaeker's swift and unswerving profession of loyalty to the Austinian model has led him rather precipitously to dismiss the idea of crimes being wrongs properly so-called. Although this is not a major criticism, as a work of this nature will quite properly wish to exclude criminal wrongs from its ambit in any event, nonetheless it seems unnecessary to deprive crimes of the character of wrongs in order to do so.

The remainder of the work is tripartite in structure – a structure dictated by reference to the three systems studied – and within each part there is a further subdivision into chapters based upon the historical development of each system. Descheemaeker's argument proceeds from a close textual exegesis of the Roman texts and the French Civil Code, as well as a thorough exploration of English writers and judgments. One of the work's great strengths is its constant reference to the detail of the material studied, and the exposition of texts is aided by judicious inclusion of dual language excerpts.

Descheemaeker's arguments on Roman law are persuasively made, though inevitably some questions will remain given the paucity of materials and the frustrating absence of information about historical textual development. Why, for instance, does Gaius analyse actions arising *quasi ex delicto* in a way which suggests fault-like qualities attaching to them if not fault itself: was this a Byzantine textual addition, or did Gaius really mean what he seems

to say? We cannot know, but Descheemaeker provides thoughtful observations on the various possibilities.

On the subject of modern French law, Descheemaeker explains that the history of the last two hundred years has been muddled. He recommends a return to the Justinianic, as opposed to the Pothieran, understanding of the delict/quasi-delict dichotomy. Pothier saw the division between delict and quasi-delict (a division preserved in France) as that between intentional wrongdoing and negligent wrongdoing. This, Descheemaeker says, was not the Roman understanding. Thus, while Pothier ends up using Roman terms and texts, he does so not in the way the Romans did, a result which has inevitably been productive of legal confusion. One effect of Pothier's approach was initially to exclude cases of strict liability, an exclusion remedied in later French jurisprudence, though not in an especially elegant way. When Descheemaeker moves on to the Napoleonic Code, there is a quite magnificent treatment of the detail of the *travaux préparatoires* behind the Code, a treatment which provides the reader with a deeper understanding of why it is that the Code drafters did not intend to perpetuate Pothier's understanding of the law of wrongs, even if later French lawyers frustratingly interpreted its provisions to accord with Pothier's view.

If the history of the division of wrongs in France is complex, then no less so is the English story. It is difficult even to define what constitutes a Common Law of wrongs, but Descheemaeker ventures that it incorporates the law of torts, equitable wrongs, and breaches of statutory duty (though the last two fall outside the scope of his work). Descheemaeker's important point about these three types of Common Law wrong is that there is no substantive difference between them, such as is found in French law; any differences are merely procedural and historical. He concludes that there is no reason to continue to separate torts from equitable wrongs merely on account of a procedural division abolished over a century ago, the same conclusion being reached in respect of torts and breach of statutory duty. He sensibly concedes, however, that overcoming such deeply entrenched legal divisions will be a difficult task.

Descheemaeker's principal suggestion for the Common Law of wrongs is that it should remodel itself by using, as in Roman law, degree of fault as its primary organisational device, albeit without splitting the law of wrongs into two groups. But what of alternative methods of dividing up the law? Descheemaeker dismisses a primary division according to "protected interests" of the claimant, believing that this would be unable to account for the whole of a law of negligence based upon a unitary wrong. He does not, however, given any real consideration to other possibilities. What, for instance, of dividing up the law by reference to the type of damage caused? Such an approach forms a principal plank of the provisions of the DCFR (see the various harms listed at VI - 2:201-2:211), together with more generalised conceptions of a wrong as the violation of a right or a legally protected interest (VI - 2:101(1)). Or, what of a division according to those wrongs requiring the presence of loss, and those not? Descheemaeker ought perhaps to have given some consideration to conceivable alternative taxonomical schemes, which is not to say that his own proposal would not be an improvement on the existing Common Law.

The minor criticisms of this impressive work noted above do not detract in any way from its overall quality. *The Division of Wrongs* is a most impressive contribution to the field of delict. It displays a maturity of analysis and degree of comfort with seminal source material normally found in the work of an established author, and thus all the more remarkable in the first monograph of an academic at the start of his career. This book should certainly find a place in the library of anyone with a serious historical interest in the European law of wrongs.

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